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Supreme Court, U.S.
FILED

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No. 08-32

In The

Supreme Court of the United States

Mark B. Price,
Petitioner
v.
GKN Aerospace Services North America,
Mike Bishop and John Minks,
Respondent(s)

On Petition For Writ Of Certiorari To The UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Mark B. Price
Pro se - Petitioner
300 Saturn Drive, Godfrey, Illinois, 62035
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QUESTIONS PRESENTED:

1) Did the Court improperly make a finding on a disputed fact regarding the applicable 12-month period with which to measure the amount of intermittent leave Petitioner took?

2) Contrary to established law did the Court hold Petitioner to an improper standard for cause, a higher burden of proof than Petitioner would have had to sustain the jury's verdict at trial?

3) Did the Court misapply or disregard evidence contrary to the standard of review dictated by Rule 56, and fail to draw all reasonable inferences in his favor?

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OPINIONS BELOW

The opinion of the United States court of appeals for the Eighth Circuit appears at Appendix A and A (1) to the petition and is unreported and is unpublished.

The opinion of the United States district court for the Eastern District of Missouri Eastern Division appears at Appendix B and B (1) thru B (9) to the petition and is unreported and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided my case was December 4th 2007.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: January 25th 2008, a copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATEMENT OF THE CASE;

Petitioner respectfully states that the Eighth Circuit Appellate Court erred in affirming summary judgment in this matter by finding Respondents did not act "willfully" because the district court granted summary judgment on the basis of disputed facts resolved in favor of the movant, Respondents; and by erroneously holding Petitioner to a sole cause burden of proof on his claims under the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., a higher burden of proof than Petitioner would be held to at trial.

On July 25, 2005, Petitioner ("Price") commenced a pro se Family and Medical Leave Act lawsuit ("FMLA") under 29 U.S.C. § 2615 (a) and (b), against his former Employer, Respondent GKN Aerospace North America, Inc. (GKN") and two of its managers, John Mink ("Mr. Mink") and Mike Bishop ("Mr. Bishop"). Petitioner alleged that all three willfully violated his FMLA rights by interfering with Petitioner taking of FMLA leave and by discharging him for exercise of his FMLA rights and in retaliation for his use of FMLA leave. Petitioner filed his lawsuit just under three years after the date of his discharge, July 25, 2002.

On October 20, 2006, the district court granted Respondent's motion for summary judgment. The district court made no findings on the merits of Petitioner's claims after concluding the record before it revealed, "no evidence or reasonable inference that Respondents knew its decision to terminate Petitioner "Price" constituted a willful violation of the statute and, thus, no genuine issue of material fact exists on the issue." Because the district court found no evidence or reasonable inference that Respondents acted willfully, it applied the two-year statute of limitations and found Petitioner filed his lawsuit one year too late.

On December 4, 2007, the Eighth Circuit Appellate Court affirmed the district court's decision to grant Respondents summary judgment. The panel agreed "with the district court

that Respondents' actions did not amount to willful FMLA violations, and that Petitioner's lawsuit was time barred because the two-year limitations period applied...."

Summary of case factual

Petitioner worked as a machinist in the same facility from September 27, 1977 until Respondent's discharged him on July 25, 2002. During that 25-year period, management of the facility moved from McDonnell Douglas to Boeing. Respondent GKN purchased the facility from Boeing and on January 8, 2001, Petitioner became an employee of Respondent GKN. On January 22, 2001, Chris Elliott, Director Human Resources sent out a notice that the Boeing Medical office would continue to process requests for leave of absence until further notice. On May 24, 2001, Respondent GKN approved Petitioner for intermittent FMLA leave twice first in May 2001 ending on May 23rd 2002 and again on May 24th 2002 through May 25, 2003.

In June 2001, Respondent GKN took over from Boeing the responsibility for monitoring attendance at Petitioner's facility. According to Respondent's records, Petitioner used 102.5 hours of FMLA leave from June 11, 2001 to December 21, 2001.There is no evidence Respondent GKN notified Petitioner of this usage. There is also no evidence Boeing or Respondent GKN recorded or notified Petitioner of his FMLA usage between May 24, 2001 and June 11, 2001.

Beginning on February 2, 2002, Respondents sent Petitioner monthly statements of his intermittent FMLA usage. According to Respondents, Petitioner used 92.7 FMLA leave hours in May 2002 for a total of 394.5 hours in 2002, Thus, for the period May 24, 2001 through May 31, 2002, Respondents notified Petitioner that he had used 394.5 hours once his first certification for intermittent FMLA leave expired. Respondents produced no evidence of Petitioner's hours of intermittent FMLA leave between May 24, 2001 and May 23, 2002.

Respondents produced no evidence it ever notified Petitioner that he had exhausted the 480 hours available to him for

intermittent FMLA leave in a 12-month period. On November 6, 2001, Respondents notified employees at Petitioner's facility as follows: "to take an approved intermittent FMLA leave, you must contact GKN Human Resources at 264-3016 no later than 48 hours after the leave time to report the data and the amount of time used. You must also notify your supervisor."

Respondent's further explained this requirement in a notice dated November 30, 2001 and stated it would implement this requirement beginning December 3, 2001. Petitioner understood Respondents were implementing a new policy. At times, Petitioner complied with the policy. At times, upon his return to work, Petitioner would inform only his supervisor that he had used FMLA leave. Petitioner did not consistently call in additionally to the Respondent GKN's Human Resources all the while he did notify his supervisor because he disputed the legality of this extra requirement to call in to the Respondents Human Resources for FMLA leave when that was not required for the taking of any other type of leave.

Petitioner considered the extra call-in requirement an illegal burden on his FMLA rights. Respondent GKN issued no notice to employees at Petitioner's facility that it used the calendar year to calculate the amount of FMLA leave taken in a 12-month period. The only information Petitioner received regarding the applicable 12-month period was his first approval form that stated he was approved for May 24, 2001 through May 24, 2002, and again on May 17th 2002. For his second approval FMLA leave approval (Petitioners Depo. p. 28:1-4).

On May 17, 2002, Respondent GKN approved Petitioner's second years request for a new intermittent FMLA leave to be beginning on May 23, 2002. (U.S. Dist. Ct. Docket Entry No. 23, Plaintiff's Exhibit 4). Respondent's only evidence that it has chosen the calendar year option is the Declaration of Respondent Mike Bishop at ¶ 13.

Respondent's produced no documents supporting this allegation or proof that it ever notified the employees at Petitioner's facility of this choice.

On July 25, 2002, Respondents notified Petitioner it was discharging him for violation of Respondent's Rule #4 which requires employees to "process and report information accurately, honestly and properly." Respondents claimed Petitioner violated this rule by "making false statements and omissions of family leave time to the company on numerous occasions."

Notably, Respondents did not state as it did to the Court, that it was discharging Petitioner because he "violated the Respondent GKN FMLA notification policy" or "because he had exhausted all the leave available to him by late June 2002." (Respondent's Brief p. 16). Respondent GKN also did not specify its claim that Petitioner "cheated the notification system by telling his supervisor he was absent for FMLA-related reasons, while not reporting the hours against his FMLA balance. Id.

REASONS FOR GRANTING THE WRIT

The district court granted summary judgment to Respondents after finding Petitioner's FMLA claims did not qualify for Section 107(C0 (2) three year statute of limitations because "Petitioner had failed to demonstrate that Respondent's knew or acted with reckless disregard as to whether its actions in terminating Petitioner violated FMLA. Respondents had provided sufficient evidence to establish it made a reasonably informed decision to terminate Petitioner." (Pet. App. B. (8), (9)). As explained in Section A below, this is an incorrect application of the accepted definition of "willful." The district court also incorrectly found that Petitioner could not establish a willful violation of FMLA because it believed Respondents evidence that it had legitimate reasons for the discharge. That is, the district court held Petitioner to a sole cause standard and found that if an employer can prove one or more legitimate reasons for a discharge decision, evidence that the decision was tainted by illegal motives that violate FMLA can be disregarded. As explained in Section B and C below, in so doing, the district court held Petitioner to a higher burden of

proof than he would have at trial.

A. Petitioner Produced Sufficient Evidence that Respondent's Engaged in a Willful violation of FMLA. The district court violated Fed. R. Civ. P. 56(c) and accepted Eighth Circuit law by failing to draw all reasonable inferences in favor of the nonmovant, Petitioner "Price" and also resolve disputed facts in favor of the nonmovant, Petitioner "Price". Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993). It made a finding of fact that Respondent's "honestly believed Petitioner was attempting to obtain additional leave fraudulently and determined that Petitioner had exceeded the number of permitted unexcused absences under Respondent GKN Attendance Policy." (Pet. App. B. (7)). Both findings had been contradicted by Petitioner's evidence.

In contrast to its credence of Respondent's evidence, the district court ignored Petitioners evidence that Respondents acted willfully. It is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided." 29 U.S.C. § 2615(a)(1). It is also "unlawful for any employer to discharge or in any other manner discriminate against any individual for opposing any practice made unlawful for this title." 29 U.S.C. § 2615(a)(2).

B. The Eighth Circuit recognizes that "retaliation through an adverse employment action based on an employee's exercise of FMLA rights is actionable." McBurney v. Stew Hansen's Dodge City, Inc., 398 F.3d 998, 1002 (8th Cir. 2005). Petitioner "Price" produced evidence that Respondents willfully violated Sections 2615A(a) and (b). A violation of these FMLA provisions is "willful" if "the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." Hanger v. Lake County, 390 F.3d 579, 583 (8th Cir. 2004).

When counsel for Respondents asked Petitioner what evidence or information he had to support his claim that GKN

willfully violated his FMLA rights, Petitioner did not answer only that Respondents knew the requirements of FMLA and what its provisions allowed Respondents to do. (Petitioners Depo. p. 111:1-8). Petitioner also pointed out that he had reasonably notified them of his need to take FMLA leave and they used their records of his leaves to discharge him. (Petitioners Depo. pp. 111- 112:2). Petitioner further pointed out that Respondents manipulated their records to concoct a justification for his discharge. (Petitioners Depo. pp. 112:15-25). Petitioner also pointed out that Respondent's Mr. Bishop and Mr. Mink acted willfully in deciding to discharge Petitioner and in refusing to rescind that decision at the grievance hearing. (Petitioners Depo. p. 115:121). Respondents Mike Bishop and John Mink stopped the grievance hearing and refused to listen to Petitioner's evidence that he had been discharged improperly. (Petitioners Depo. p. 115:8-119:2).

In finding Respondents honestly believed Petitioner committed fraud, the district court credited their statement of their belief without any corroborating evidence that Petitioner acted fraudulently and it ignored Petitioner's evidence that he reported all his leave time either to his immediate supervisor and/or to Respondents' Human Resources but did not consistently report to both because he disputed this requirement and believed it was an unlawful burden on his use of FMLA leave. Under 29 CFR 825.302(d), an employer can require its employees to comply with its procedures for requesting FMLA leave, "however, failure to follow such internal employer procedures will not permit an employer to disallow or delay an employee's taking FMLA leave if the employee gives timely verbal or other notice."

Further, FMLA requires an employee only to provide "enough information to put the employer on notice that the employee may be in need of FMLA leave." Rask v. Fresenius Med. Care N. America, No. 06-3923 (8th Cir. December 6, 2007), 2007 U.S. App. LEXIS 28198. Petitioner's evidence is that he consistently gave reasonable notice of his use of

intermittent FMLA. Taking Respondent's word for the state of their records on the amount of leave Petitioner took, their records were contradictory and incomplete. They had no evidence of the actual amount of leave Petitioner took between the time GKN took over the facility and the date of Petitioner's discharge. They certainly had no evidence Petitioner acted fraudulently. Their lack of record keeping violates 29 U.S.C. § 2616(b).

In finding Petitioner exhausted the leave available to him, the district court improperly made a finding on a disputed fact regarding the amount of leave time Petitioner actually took. While this decision of the lower court may be erroneous, the national importance of this case for having the Supreme Court decide the question involved is tantamount to the rights and privileges of any individual qualified to exercise benefits under the FMLA. A showing as to whether the decision of the court which decided Petitioners case was in conflict with the decisions of other appellate court decisions is importance not only in Petitioners case but additionally to any other similarly situated FMLA qualified individual, and in the improper way the lower court made it's erroneous decision of Petitioners case by the way in which it decided its finding Petitioner had exhausted the leave available to him. In its decision the district court also improperly made a finding on a disputed fact regarding the applicable 12-month period with which to measure the amount of intermittent leave Petitioner took.

Under 29 C.F.R. § 825.200(b), an employer can choose a calendar year as its method for measuring the amount of intermittent leave taken. In a well-reasoned opinion, the Ninth Circuit has held that employers must notify employees of which method they have chosen for measuring FMLA leave usage. Bachelder v. America West Airlines, Inc., 259 F.3d 1112, 1128 (9th Cir. 2001). See also Austin v. Fuel Systems, LLC, 379 F. Supp. 2d 884 (W.D. Mich. 2004)(explaining and following Bachelder). Petitioner produced evidence the first applicable 12-month period had started on May 24, 2001 and

the second applicable second year qualifying period had started on May 23, 2002.

Respondents' only evidence they used the calendar year was Mr. Bishop's unsubstantiated declaration. They produced no evidence at all that they notified their employees that they had selected the calendar year as the measure. Where an employer fails to notify its employees of its selection, courts should use the method most favorable to the employee. 29 C.F.R. § 825.200(e). Here, it should be the method Petitioner believed was being used.

Petitioner believed Respondents were using the 12-month period measure from the date the employee's first FMLA leave begins. Thus, the district court should have found that a new 12-month period with 480 available FMLA leave hours began on May 24, 2002. Respondents contrary to law, willfully chose the calendar year in order to seemingly prove Petitioner had exhausted his FMLA hours for the relevant 12-month period.

In crediting Respondents' versions of the facts and ignoring evidence of willfulness produced by Petitioner, the district court erred in its finding that Petitioner could not prove Respondents acted willfully. In agreeing with the district court that "defendants' actions did not amount to willful FMLA violations," the panel made the same errors. Accordingly, Petitioner's writ for certiorari should be granted.

C. The District Court Improperly Held Petitioner to a Sole cause Burden of Proof on his FMLA Claims. The district court improperly held Petitioner to a sole cause burden of proof by holding that Petitioner could not prevail if Respondents acted from both legitimate and illegal motives. The district court made three findings of fact in favor of Respondents and that Respondents acted with legitimate motives: (1) Mr. Bishop and Mr. Mink investigated and concluded Petitioner falsely reported to his supervisor that his absences were approved for FMLA leave; (2) "determined there were inconsistencies between the number of absences Petitioner reported to his

immediate supervisor and the number of absences he reported to the FMLA administrator;" (3) and determined "Petitioner exceeded the number of absences permitted under the FMLA and under Respondent GKN no-fault Attendance Policy."

Based on these erroneous findings, the district court decided Petitioner could not establish GKN "willfully violated FMLA" because "Petitioner should have been terminated for his unexcused absences." (Pet. App. B. (8), (9)).

In holding that the record contained insufficient evidence to sustain the jury's verdict, the district court misapplied the standard of review dictated by Rule 56. The court disregarded evidence favorable to Petitioner–the evidence supporting his prima facie case and undermining Respondent's nondiscriminatory explanation–and failed to draw all reasonable inferences in his favor. For instance, while acknowledging the potentially damning nature of Respondent's FMLA false statements for January being the annual vestment of FMLA leave starting date comments, the court relied upon counting them towards the ground that they were not made in the direct context of Petitioner' termination.

Additionally the district court discredited Petitioners evidence that in May 2002 he was once again approved for the actual second year of qualified FMLA leave as an approved starting date for Petitioner's FMLA leave and by erroneously giving weight to Respondent's statement that there was no other evidence suggesting of material facts of evidence that could exist, that could be a motivating factor for violations of the FMLA.

Moreover, The ultimate question in every intentional FMLA violation case is whether the Petitioner was the victim of intentional discrimination. Here, the District Court ruled that Petitioner was required to show solely by a misapplied burden of proof that his FMLA leave usage was a determining and motivating factor in the decision to terminate him. A higher burden of proof than Petitioner would be held to before a jury

to show Respondents explanations were pretextual.

Petitioner had established a prima facie case, introduced enough evidence for a jury to reject respondent's explanation, and produced additional evidence that Respondents were motivated by intentional interference and retaliatory violations to his FMLA leave usage and was principally responsible for Petitioners' firing, there was sufficient evidence for a jury to conclude that Respondents had intentionally discriminated.

The FMLA prohibits employers from "consideration of an employee's use of FMLA leave as a negative factor in an employment action." Stallings v. Hussman Corp., 447 F.3d 1041 (8th Cir. 2006)(emphasis added); 29 C.F.R. 825.220(c). While the Eighth Circuit has not decided whether a plaintiff bringing a FMLA claim must prove the illegal motive was a "determining factor" or a "motivating factor," the Eighth Circuit Model Jury Instructions § 5.80 and § 5.81A, allows for one of these lesser burdens and not sole cause as being the proper burden of proof. As Justice O'Conner wrote in Price Waterhouse v. Hopkins, 490 U.S. 228, 282 (1989), "since we know that the words 'because of' do not meant 'solely because of,' we also know that Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations." The 1991 amendment to Title VII requires only that a plaintiff "demonstrate" that an illegal factor was "a motivating factor." Under Darby v. Bratch, 287 F.3d 673, 679 (8th Cir. 2002), FMLA retaliation claims are subject to same analysis as Title VII claims. See also Richardson v. Monitronics International, Inc., 434 F.3d 327 (5th Cir. 2005)(adopting a mixed motive analysis for FMLA cases).

Accordingly, at most, Petitioner would be required to prove at trial only that his opposition to Respondents' call-in requirement and his use of FMLA leave were a determining factor in the decision to discharge him. For this reason, the fact that there may have also been legitimate reasons for his discharge, and Petitioner disputed that Respondent's had any

legal reason for his discharge, does not preclude Petitioner from prevailing on his claim that Respondents willfully violated FMLA.

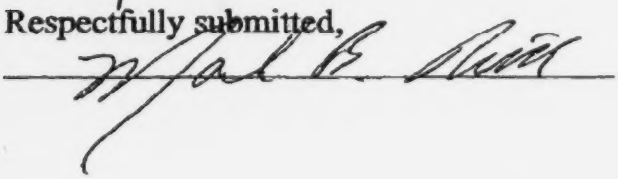
Therefore, the district court erred in finding that a demonstration of legitimate reasons for the discharge bars Petitioner from trial by jury. In adopting the district court's findings, the panel made the same error. Accordingly, Petitioner's petition for rehearing should have been granted.

Conclusion

For all of the foregoing reasons, the December 4, 2007 adoption of the district court's grant of summary judgment in this matter is contrary to established federal law. And the decision of the lower court which decided Petitioners claims was in conflict with the decisions of other circuit court decisions, are equally important to any other similarly situated FMLA qualified individual in its improper finding Petitioner had exhausted the leave available to him. Accordingly, the Court should grant Petitioner's writ for certiorari and reverse the district court's decision to grant Respondents summary judgment and allow a jury decide the merits of his claims against Respondents.

Date: April 24, 2008

Respectfully submitted,



UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-4036
Mark B. Price, Appellant
v.
GKN Aerospace North America, INC., et al., Appellees

Appeal from
U.S. District Court for the Eastern District of Missouri - St. Louis
(4:05-cv-001147-ERW)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties. After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. December 04, 2007 Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.
_____ /s/ Michael E. Gans

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-4036

Mark B. Price, Appellant,
v.
GKN Aerospace North America,
Inc.; John Mink; Mike Bishop,
Appellees.
[UNPUBLISHED]
Appeal from the
United States District Court for the
Eastern District of Missouri.
Submitted: November 14, 2007
Filed: December 4, 2007

Before MURPHY, SMITH, and SHEPHERD, Circuit Judges.

PER CURIAM.
Mark B. Price appeals the district court's adverse grant of summary judgment in his lawsuit brought under the Family and Medical Leave Act (FMLA). Having conducted de novo review of the record and having considered Price's arguments for reversal, see Hanger v. Lake County, 390 F.3d 579, 582 (8th Cir. 2004) (standard of review), we agree with the district court that defendants' actions did not amount to willful FMLA violations, and that Price's lawsuit was time-barred because the two-year limitations period applied, see 29 U.S.C. § 2617(c) (action may be brought no later than two years after date of last event constituting alleged FMLA violation, unless violation is willful, in which case limitations period is extended to three years).
Accordingly, we affirm. See 8th Cir. R. 47B.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARK B. PRICE,

Plaintiff,

vs. Case No. 4:05CV01147 ERW

GKN AEROSPACE NORTH AMERICA, INC., JOHN MINK, and MIKE BISHOP,

Defendants.

JUDGMENT

In accordance with the Memorandum and Order entered on this date and incorporated herein, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants GKN Aerospace North America, Inc., John Mink and Mike Bishop are granted summary judgment in the above-styled action. All claims against Defendants are DISMISSED with prejudice.

Dated this 20th day of October, 2006.

E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARK B. PRICE,
Plaintiff,

vs. Case No. 4:05CV01147 ERW

GKN AEROSPACE NORTH AMERICA, INC., JOHN MINK, and MIKE BISHOP,

Defendants.

MEMORANDUM AND ORDER

This matter is before the Court upon Defendants GKN Aerospace North America, Inc., John Mink and Mike Bishop's Motion for Summary Judgment [doc. #19].

I. BACKGROUND FACTS

Plaintiff Marc B. Price ("Plaintiff") commenced employment with Defendant GKN Aerospace North America, Inc. ("Defendant GKN"), as a Journeyman Machinist, in January, 2000. Plaintiff was terminated on July 25, 2002.[1]

Defendant GKN's employees are represented by a union. GKN has a collective bargaining agreement with the union, which governs the employees' rights and responsibilities. The collective bargaining agreement ("CBA") provides that an employee's leave of absence "will be granted in accordance with the Family and Medical Leave Act." Def.'s Statement of Uncontroverted Material Facts ¶ 5. Defendant GKN claims that employees are entitled to 480 hours of FMLA, which vests on the first of January each year. In the event of an absence, GKN employees are instructed to "contact GKN Human Resources at [telephone number] no later than

1 Plaintiff took FMLA intermittent leave from May 24, 2001 to May 23, 2002.

2 Defendant GKN states that the Attendance Policy has been used to determine attendance violations since the company's inception.

3 Under the Attendance Policy, employees are subject to disciplinary action regardless of the "excuse" or "fault," unless the absence is otherwise excluded by the CBA or state or federal law. Def.'s Statement of Uncontroverted Material Facts ¶ 10. Approved Family and Medical Leaves of Absence are included in the list of exclusions to the "no fault" absences. Id. at ¶ 12. Defendant GKN claims that from 2001 to 2005, nine employees, other than Plaintiff, were terminated in accordance with the "no fault" Attendance Policy. Id. at ¶ 15.

4 Defendant GKN states that, during this time period, Plaintiff properly reported some of his absences from work to Mr. Runge. These absences were approved as FMLA-qualifying.

48 hours after the leave time to report the date and amount of time used. [The employee] must also notify [his] supervisor." Id. at 26. GKN also has a written attendance policy for its bargaining unit employees, denominated "Attendance Policy and Guidelines for Collective Bargaining Unit Employees" ("Attendance Policy").2 The Attendance Policy provides that if an employee accrues nine days of "no fault" absences, then he will be terminated from employment.3 Defendant GKN contends that during the first 200 calender days of 2002, Plaintiff missed 530.9 hours of work. On July 24, 2002, the Senior Human Resources Generalist, Defendant Mike Bishop ("Mr. Bishop"), was apprised of discrepancies between the number of Plaintiff's absences documented by Plaintiff's direct supervisor, Bill Davis ("Mr. Davis") and the number of absences Plaintiff reported to the Company Leave Administrator, Mike Runge ("Mr. Runge").4 Mr. Bishop conducted an investigation and concluded that Plaintiff failed to report 101.8 of the 530.9 hours to Mr. Runge and, thus, the hours were never deducted from Plaintiff's FMLA leave balance. Mr. Bishop further concluded that Plaintiff reported to Mr. Davis that his absences qualified for and were deducted from his FMLA leave allotment. Mr. Bishop also determined that as of the end of June 2002, Plaintiff had exhausted all leave available to him and should have been

5 According to Defendant GKN, Plaintiff's vacation and sick leave vested, for the 2001-2002 year, on September 10 and September 27, 2001, respectively. Defendant GKN states that, by December 13, 2001, Plaintiff exhausted all of the vacation and sick leave he was entitled to for that year.

terminated for his subsequent unexcused absences.5 Mr. Bishop recommended to the director of Plaintiff's department, Defendant John Mink ("Mr. Mink"), that he terminate Plaintiff for violating company policy and for falsely reporting FMLA leave time to his supervisors and to the GKN Leave Administrator. Plaintiff was terminated the next day, on July 25, 2002. In response, Plaintiff disputes Defendant GKN's alleged reason for terminating him. He claims that he was unlawfully terminated for failure to adhere to Defendant GKN's requirement that employees report their FMLA leave of absence to both an immediate supervisor and to the Leave Administrator, not for reporting his absences dishonestly. Plaintiff argues that he was not required to report his absences to the Leave Administrator because informing his immediate supervisor of his absences was sufficient to impute notice to GKN, for FMLA purposes. In addition, Plaintiff claims that when he reported his absences, he stated that they were for personal leave and Mr. Davis incorrectly documented his absences as FMLA leave. Finally, Plaintiff claims that he was re-approved for FMLA leave on May 24, 2001 and May 23, 2002. Plaintiff states that on these dates he was entitled to twelve more weeks of leave and denies that he exhausted his leave entitlement by June 2002. At a grievance hearing on the matter, it was determined that Plaintiff was terminated for just cause.

On July 25, 2005, three years after his termination, Plaintiff filed suit against Defendants, alleging that he was terminated for taking FMLA leave, in violation of the job protection guarantees of the Family and Medical Leave Act (FMLA), 29 U.S.C.S. § 2601 et seq. In addition, Plaintiff asserts a retaliation claim under the FMLA.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56(c), a court may grant a motion for summary judgment only if all of the information before the court shows "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The United States Supreme Court has noted that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327 (quoting Fed. R. Civ. P. 1). "By its terms, [Rule 56(c)(1)] provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Material facts are those "that might affect the outcome of the suit under the governing law," and a genuine material fact is one such that "a reasonable jury could return a verdict for the nonmoving party." *Id.*

If the non-moving party has failed to "make a showing sufficient to establish the existence of an element essential to that party's case, . . . there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex*, 477 U.S. at 322-23. "Thus, where the moving party can point to the absence of any evidence satisfying a necessary element of a claim, such as damages, and the non-moving party fails to produce any such evidence, summary judgment is properly entered." *Meterlogic, Inc. v. KLT, Inc.*, 368 F.3d 1017, 1018 (8th Cir. 2004).

The initial burden of proof in a motion for summary judgment is placed on the moving party to establish the non-existence of any genuine issue of fact that is material to a judgment in its favor. *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op.*,

Inc., 838 F.2d 268, 273 (8th Cir. 1988). Once this burden is discharged, if the record does in fact bear out that no genuine dispute exists, the burden then shifts to the non-moving party who must set forth affirmative evidence and specific facts showing there is a genuine dispute on that issue. *Anderson*, 477 U.S. at 249. When the burden shifts, the non-moving party may not rest on the allegations in its pleadings, but by affidavit and other evidence must set forth specific facts showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e); *Stone Motor Co. v. Gen. Motors Corp.*, 293 F.3d 456, 465 (8th Cir. 2002). To meet its burden, the non-moving party must "do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In fact, the non-moving party must show there is sufficient evidence favoring the non-moving party which would enable a jury to return a verdict for it. *Anderson*, 477 U.S. at 249; *Celotex*, 477 U.S. at 324. "If the non-moving party fails to produce such evidence, summary judgment is proper." *Olson v. Pennzoil Co.*, 943 F.2d 881, 883 (8th Cir. 1991).

6 An eligible employee is defined as an employee "who has been employed (i) for at least 12 months by the employer with respect to whom leave is requested under section 2612 of this title; and (ii) for at least 1,250 hours of service with such employer during the previous 12-month period." 29 U.S.C. § 2611(2)(A). There is no dispute that Plaintiff is an "eligible employee."

III. DISCUSSION

The FMLA entitles qualifying employees[6] to twelve weeks of unpaid leave, during a 12-month period, if among other things an employee has "a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C.S. § 2612 (a)(1)(D). The FMLA prohibits employers from interfering with, restraining, or denying the exercise of these rights. 29 U.S.C.S. § 2615 (a)(1). An employer who interferes with an eligible employee's rights

under the FMLA, is liable for damages and "such equitable relief as may be appropriate." 29 U.S.C.S. § 2617(a)(1).
A. Statute of Limitations for FMLA Claims Under 29 U.S.C.S. § 2617, Congress implemented a two-tiered statute of limitations for FMLA claims. Generally, an individual asserting a violation must bring his claim within two years of the last event constituting the alleged violation." § 2617(c)(1) However, the statute of limitations is increased from two years to three years in cases that involve an employer's "willful" violation of the FMLA. 29 U.S.C. § 2617(c)(2); *Samuels v. Kansas City Missouri School District*, 437 F.3d 797 (8th Cir. 2006). To establish a "willful" violation of the FMLA, the 8th Circuit has instructed that a plaintiff must show that the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute. *Hanger v. Lake County*, 390 F.3d 579, 583 (8th Cir. 2004). The court in *Hanger* found that the Supreme Court's definition of willful under the Fair Labor Standards Act (FLSA) in *McLaughlin v. Richland Shoe*

7 The Court declines to adopt Plaintiff's contention that the Statute of Limitations began on the date of the Grievance hearing decision, August 9, 2002. The Eight Circuit has made clear that subsequent events that may change the outcome of the employer's original adverse decision does not constitute a new violation of the FMLA. See Hanger, 390 F.3d at 583 (The Board of Commissioner did not commit an additional violation of the FMLA on the date it accepted Plaintiff's former resignation).

8 An action is commenced on the date the complaint is filed. See 29 U.S.C. § 2617(c)(3). Co., 486 U.S. 128, 133 (1998), also applies to the FMLA. In McLaughlin, the Court explained that "if an employer acts reasonably in determining its legal obligation, its action cannot be deemed willful .... If an employer acts unreasonably, but not recklessly, in determining its legal obligation, then ... it should not be ... considered [willful]. Id. at 135 n.13 Further, an employer's general knowledge about the statute's potential applicability, by itself, fails to demonstrate willfulness. Hanger, 390 F.3d at 584.

Plaintiff's FMLA claim accrued on July 25, 2002, the day he

was terminated.[7]
Plaintiff filed his FMLA complaint on July 25, 2005.[8]

There is no dispute that Plaintiff brought his claim more than two years after the last alleged wrongful act.

The question for the Court, then, is whether the three-year statute of limitations applies. Plaintiff contends that his FMLA claim is subject to the three year statute of limitations because Defendant GKN willfully violated his rights by terminating him for absences they knew were excused under the FMLA. The Court concludes that Plaintiff has failed to demonstrate that Defendant GKN knew or acted with reckless disregard as to whether its actions in terminating Plaintiff violated the FMLA. Defendant GKN has provided sufficient evidence to establish that it made a reasonably informed decision to terminate Plaintiff. Mr. Bishop and Mr. Mink recommended Plaintiff's termination after they conducted an investigation and concluded that he falsely reported, to his immediate

[9]Plaintiff admits that he stopped reporting his absences to the individual appointed by GKN to approve employees' FMLA leave.

[10] In support of their allegation, Defendant GKN provided the Court with a summary of the dates where it claims Plaintiff reported to his immediate supervisor that his absences qualified for FMLA leave but either failed to notify GKN's FMLA Leave administrator of his absences or reported less time than he actually took. Plaintiff has not challenged the accuracy of the dates nor the absences.

[11]The Court disagrees with Plaintiff's contention that he was entitled to twelve more weeks of FMLA leave on May 24, 2001 and May 23, 2002. The evidence in the record indicates that, on those dates, Defendant GKN granted Plaintiff intermittent leave at the recommendation of his physician. Intermittent leave is defined as "FMLA leave taken in separate blocks of time due to a single qualifying reason." 29 C.F.R. § 825. 203 (1993). Intermittent leave does not entitle an employee to additional FMLA leave time. Instead, if an employee takes leave on an intermittent or reduced leave schedule, the amount of leave actually taken is counted toward the 12 weeks of leave to which the employee is entitled. Id. § 825.205(a); see also Id. §

825.200 (a)(1) (an eligible employee's FMLA leave entitlement "is limited to a total of 12 workweeks of leave during any 12-month period.").

12 Defendant GKN has provided the Court with sufficient evidence to establish that it measures FMLA leave eligibility on a calender year basis. On the first day of January each year, employees are credited with 12 weeks of FMLA leave. See Bishop Decl. ¶

13. In addition, there is sufficient evidence in the record to indicate that Plaintiff exceeded his twelve month leave entitlement for 2002, by the end of June 2002. See Def.'s Statement of Uncontroverted Material Facts ¶ 45.

supervisor, that his absences were approved for FMLA leave.[9] The supervisors also determined that there were inconsistencies between the number of absences Plaintiff reported to his immediate supervisor and the number of absences he reported to the FMLA leave administrator.[10] Finally, Defendant GKN's supervisors determined that, by June 2002, Plaintiff exceeded the number of absences permitted under the FMLA and under GKN's no-fault Attendance Policy.[11] Therefore, irrespective of Plaintiff's alleged fraudulent acts, Plaintiff should have been terminated for his unexcused absences. Thus, Plaintiff cannot establish that Defendant GKN willfully violated the FMLA.

Furthermore, the Federal Appellate courts have held that an employer is not in violation of the FMLA if it discharges an employee because it honestly believed that the employee committed fraud in making a claim, even if its conclusion is mistaken. *See Medley v. Polk Co.*, 260 F.3d 1202, 1207-1208 (10th Cir. 2001) (finding that an employer who discharged employee honestly believing that employee was not using leave under the FMLA is shielded from liability even if its conclusion was mistaken); *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 680 (7th Cir. 1997) ("Discrimination statutes allow employers to discharge employees for almost any reason whatsoever as long as the reason is not illegal discrimination. Thus when an employee is discharged because of an employer's honest mistake, federal anti-discrimination

laws offer no protection."). The Court finds that Defendant GKN has demonstrated that it terminated Plaintiff because it honestly believed that Plaintiff was attempting to obtain additional leave fraudulently and determined that Plaintiff had exceeded the number of permitted unexcused absences under Defendant GKN's Attendance Policy. Accordingly, the Court's review of the record reveals no evidence or reasonable inference that Defendant GKN knew its decision to terminate Plaintiff constituted a willful violation of the statute and, thus, no genuine question of material fact exists on the issue. Therefore, the Court finds that the two year statute of limitations applies and Plaintiff's claim is time barred. The Court is not required to determine whether Plaintiff's allegations survive summary judgment on the merits.

Accordingly,
IT IS HEREBY ORDERED that Defendants GKN Aerospace North America, Inc., John Mink and Mike Bishop's Motion for Summary Judgment [doc. #19] is **GRANTED.**
Dated this 20th day of October, 2006.

_____
E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No: 06-4036
Mark B. Price, Appellant
v.
GKN Aerospace North America, INC., et al., Appellees

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:05-cv-001147-ERW)

ORDER

The petition for rehearing by the panel filed by Appellant Price is denied. January 25, 2008 Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.
_____ /s/ Michael E. Gans

1The Honorable E. Richard Webber, United States District Judge for the Eastern
District of Missouri.